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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

1980 TERM

PETER J. MACHI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Petitioner, Peter J. Machi, pursuant to 18 U.S.C. §3006A(d)(6) and Rule 46.1 of the United States Supreme Court, asks leave to file the attached Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit without prepayment of costs, and to proceed in forma pauperis. Pursuant to an appointment under the Criminal Justice Act of 1964, as amended, the Federal Public Defender's Office represented petitioner in the United States District Court for the Western District of Pennsylvania and on appeal to the United States Court of Appeals for the Third Circuit.

DATED: September 30, 1980

Respectfully submitted,

GEORGE E. SCHUMACHER
FEDERAL PUBLIC DEFENDER

By: T. S. White

Thomas S. White
Assistant Federal Public
Defender
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650 Smithfield Street
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PETER J. MACHI,

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v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

GEORGE E. SCHUMACHER
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By: Thomas S. White
Thomas S. White
Assistant Federal Public
Defender

QUESTIONS PRESENTED

1. Whether the Fourth Amendment permits the search of a duffel bag found in a stolen vehicle legally seized by the authorities without consent, without exigent circumstances, and without a warrant.

2. Whether the Fifth Amendment was violated when the trial court refused to order the Government to disclose the address of a material witness who might have given exculpatory evidence as to Machi's guilty.

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OPINION BELOW

The order of the United States Court of Appeals for the Third Circuit affirming the judgment conviction has not been reported as yet; but is set forth in Appendix at 1a. There was no opinion filed.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Third Circuit entered the judgment sought to be reviewed on August 4, 1980 affirming Petitioner Machi's conviction in the United States District Court for the Western District of Pennsylvania.

Section 1254(1) of Title 28 of the United States Code confers jurisdiction upon the United States Supreme Court to review the final judgment of the Third Circuit by writ of certiorari. Pursuant to Rules 20.4 and 29.1 of the United States Supreme Court, the time for filing a petition for writ of certiorari began to run on August 4, 1980 and expires on October 3, 1980.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment IV

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty,

or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Title 18, United States Code, Section 371

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Title 18, United States Code, Section 924(c)

(c) Whoever--

(1) uses a firearm to commit any felony for which he may be prosecuted in a court of the United States, or

(2) carries a firearm unlawfully during the commission of any felony for which he may be prosecuted in a court of the United States.

shall, in addition to the punishment provided for the commission of such felony, be sentenced to a term of imprisonment for not less than one year nor more than ten years. In the case of his second or subsequent conviction under this subsection, such persons shall be sentenced to a term of imprisonment for not less than two nor more than twenty-five years and, notwithstanding any other provision of law, the court shall not suspend the sentence in the case of a second or subsequent conviction of such person or give him a probationary sentence, nor shall the term of imprisonment imposed under this subsection run concurrently with any term of imprisonment imposed for the commission of such felony.

STATEMENT OF THE CASE

Peter J. Machi, petitioner, (Machi) along with Howard Gregory Blum (Blum) and James Donald Eckman (Eckman) were found guilty of violations of Sections 371 and 924(c) of Title 18 of the United States Code. Machi was sentenced to consecutive terms of five years on Count one and three years on Count two for a

total of eight years. Machi is presently on bail pending the outcome of his Petition for Writ of Certiorari.

The gist of the charges was that Adean McCarthy (McCarthy) and the three defendants had conspired to rob an armored car carrying money belonging to a bank, whose accounts were insured by the Federal Deposit Insurance Corporation.

Machi, along with Eckman, Blum, and McCarthy were arrested at the parking lot of a restaurant near Pittsburgh, Pennsylvania, called Uncle Charlie's. A van was seized in which the four men had been riding, and removed to a police parking lot. The van had been reported stolen from a used-car lot and FBI agents called the owner of the lot for permission to search the van. The consent was given. In the van, the agents found a duffel bag. Without a warrant, or obtaining any further consent, or ascertaining if the bag belonged to the owner, the agents opened the bag. Inside they found guns, masks, tools, and walkie-talkie radios. After the denial of defendant's motion to supress, all this evidence was admitted at the trial against Machi and the other two defendants.

McCarthy, who was shown to have a lengthy criminal record, pursuant to a plea bargain, testified that he and the others, including Machi, had conspired to steal the money from the armored car; that they had planned the robbery and had followed the truck on a number of occasions. McCarthy testified that there had been a fifth man,"Gene", who was an expert locksmith, who had made keys to fit the locks on the armored car. McCarthy said he did not know Gene's last name. The theft was planned for the day of the arrest but had not taken place because the armored car was surrounded by other vehicles which was planned for that day was abandoned. The question whether it was abandoned totally, or just temporarily, was unclear. The four men then left the area of the Valencia Lounge and drove in a stolen van to the

parking lot of Uncle Charlie's Restaurant, where they were arrested by FBI agents.

The agents testified at trial that they had had the group under surveillance for some time due to information given by an informant. The Government refused to disclose the informant.

During one surveillance, near the armored car company's garage, one agent testified that he had seen Robert Eugene Mercier, in Machi's vehicle with another person, who was not Machi.

All evidence seized from the stolen van was introduced into evidence against all defendants.

Machi attempted to have the Government disclose the address of Gene Mercier on the ground that he may give exculpatory evidence as to Machi, but the Government refused to do so. The Government was permitted to give its reasons to the trial court in camera, outside the hearing of Machi's counsel. The court then refused to order the Government to give Mercier's address on the ground that defendant Machi had known "Mercier".

Machi did not testify but his wife testified that Machi had known McCarthy for about a year and, as McCarthy was unemployed, allowed him to borrow his van from time to time. She testified that on the day of the arrest, Machi was going to apply for a job near the place of the arrest. She also testified that her husband had no criminal record.

Machi's counsel argued to the jury that the evidence, aside from the biased evidence of McCarthy, indicated that Machi was used by McCarthy as a chauffeur without any knowledge as to what was going on and that he had used his relation's car at the time of the arrest and did not use a stolen vehicle and was in the vicinity on his way to apply for work.

The jury convicted Machi of both counts and the court sentenced him to a total of eight years imprisonment. Machi was permitted to remain on bond pending appeal and the Circuit Court of Appeals stayed its mandate until a decision by this Court of Machi's petition for writ of certiorari.

REASONS FOR GRANTING THE WRIT

1. Whether the Fourth Amendment permits the search of a duffel bag found in a stolen vehicle legally seized by the authorities without consent, without exigent circumstances, and without a warrant.

This question presents an issue that can only be clarified by this court by granting the writ in this case. The question involves a question of standing left open in United States vs. Salvucci, U.S. (1980) Slip Opinion No. 79-244, decided June 25, 1980, as applied to instances involving luggage found in automobiles as in the case of Arkansas vs. Sanders, 442 U.S. 753 (1979).

Because this matter directly involves basic Fourth Amendment rights and involves matters which should be definitively decided to aid both police officers and all those who function in the criminal justice system, the Court should grant the writ on this issue.

Furthermore, the Third Circuit Court of Appeals, by the ruling in this case, has indicated that it still intends to follow United States vs. Milhollan, 599 F.2d 518 (1979) certiorari denied, 444 U.S. 909 (1979), (three Justices dissenting from the denial of the writ).

In Milhollan the Court of Appeals held that it was not necessary for authorities to secure a warrant to search a container found in a vehicle where the authorities believe that

evidence of a crime may be anywhere in the automobile. As the dissenting Justices pointed out, Arkansas vs. Sanders, supra, repudiated the reasoning of the Court of Appeals. Here the Court of Appeals again uses that reasoning, sub silentio.

The Third Circuit has not indicated that it has abandoned its holding in Milhollan as of this date.

This Court has held in Arkansas vs. Sanders, supra, at p. 763, that the exigency of mobility must be assessed at the point immediately before the search--after the police have seized a container. The extent of its mobility is in no way affected by the place from which it was taken. "Accordingly, as a general rule there is no greater need for warrantless searches of luggage taken from automobiles than of luggage taken from other places." 442 U.S. at pp. 763-764.

Here defendants were under arrest and the reportedly stolen vehicle was driven to the Pennsylvania Police Barracks. The van had been stolen from a used car lot. The owner of the vehicle was called and consented to the search of the vehicle. Although the agents were aware that no luggage had been reportedly stolen, they did not attempt to ascertain if the duffel bag was the owner's, nor attempt to secure his permission to open it.

In short, the agents had no consent to search the duffel bag; and no exigent circumstances to justify their entry into the bag.

It is expected that the Government will argue that the duffel bag was abandoned, but the short answer to this argument is that there is no evidence that the bag was abandoned. Certainly, the fact that it was found in a stolen vehicle that Machi had been riding in a short time before his arrest does not indicate abandonment but rather possession. Furthermore, the arrest prevented any further exercise of dominion over the duffel bag and

the arrest cannot be utilized as evidence of abandonment. See United States vs. Chadwick, 433 U.S. 1, 14 (1977), where the Court said that the expectation of privacy is not diminished simply because the owner's arrest occurs in a public place. Fletcher vs. Warnwright, 399 F.2d 62 (5th Cir. 1968)

Because the holding of this case would seem to point up the conflict between the holding in United States vs. Milhollan, supra, and this Court's opinion in Arkansas vs. Sanders, supra, and United States vs. Chadwick, supra, the writ should be granted on this issue.

2. Whether the Fifth Amendment was violated when the trial court refused to order the Government to disclose the address of a material witness who might have given exculpatory evidence as to Machi's guilt.

The Fifth Amendment declares:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

This court, in Roviaro vs. United States, 353 U.S. 53 (1957), held that a defendant was entitled to know the name of the informant in that case because:

(1) The circumstances demonstrated that the informer's possible testimony was highly relevant and might have been helpful to the defense.

(2) On the record in that case, it could not be assumed that the informer was known to the petitioner and avialable to him as a witness, nor that the informer had died before trial.

(3) The evidence addressed at trial was so closely related to the informer as to make his identity and testimony highly material.

Here Mercier (Gene) was never identified by the Government as the informant, but it was never denied that he was the informant.

Regardless, Mercier was observed when the agents were conducting their surveillance, riding in Machi's vehicle with a person other than Machi, and was a witness who might have been extremley helpful to the defense.

There is no evidence that Machi knew Mercier or his whereabouts. McCarthy, who testified for the Government, admitted that he knew him only as "Gene", although he admitted he met him on several occasions.

The trial judge held that Machi knew "Mercier" and, therefore, was not entitled to his address. Machi was not allowed to learn the reasons for the nondisclosure becasue the court granted the Government's motion to allow it to make a record outside of his presence or his counsel's presence.

Machi submits that Mercier could well have assisted him in proving that he was not a knowing participant in this conspiracy but that Machi was only an innocent bystander. the Government is expected to argue that Machi does not know if Mercier would give favorable testimony or not, and was simply on a fishing expedition for evidence. But this was exactly the posture of the case in Roviaro, supra, when defense counsel asked that the Government provide the name and address of the informant.

In the instant case, Machi was never shown to have known Mercier by any other name than Gene nor was he shown to have known his address. It was shown, however, that Mercier did have knowledge

of the facts, which could have exculpatated Machi.

The writ should be granted on this point because of the apparent conflict between this court's holding in Roviaro vs. United States, supra, and the Court of Appeal's holding in this case.

Furthermore, this court should grant the writ in exercise of its supervisory powers over the lower federal courts to ensure that trials are conducted fairly in courts of the United States.

For these reasons the writ should be granted.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Third Circuit.

DATED: September 30, 1980 Respectfully submitted,

GEORGE E. SCHUMACHER
FEDERAL PUBLIC DEFENDER

By: T—S White
Thomas S. White
Assistant Federal Public Defender

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-2702

UNITED STATES OF AMERICA

vs.

Howard Gregory BLUM
James Donald BOWMAN
Peter J. MACHI
Aedan Charles McCARTH

Peter J. Machi,

Appellant

Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Crim. No. 79-00138-03)

Submitted Under Third Circuit Rule 12(6)
August 4, 1980
Before: ALDISERT and SLOVITER, Circuit Judges, and HANNUM, District Judge.*

JUDGMENT ORDER

After considering the contentions raised by appellant, to-wit, that (1) the trial court erred in not suppressing the physical evidence found in the duffel bag at the time of the Machi arrest; (2) Machi was denied his right to effective assistance of counsel under the Sixth Amendment by the trial court when the court ruled that neither Machi nor his counsel was to hear the reasons for the government not revealing the last known address of Gene, a potential defense witness; (3) the trial judge erred in not requiring the disclosure by the government of the last known address of Robert Eugene Mercier and therefore violated Machi's rights to a fair trial; (4) the trial court erred in charging the jury that once an overt act was committed following the conspiratorial agreement, no participant in that agreement could validly withdraw; and (5) the trial court erred in not dismissing Count II of the indictment because of insufficient evidence; it is

* Honorable John P. Hannum, of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT,

Circuit Judge

Attest:

Sally Mrvos, Clerk

DATED: AUG 4 1980

APPENDIX 1a-2

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 79-2702

UNITED STATES OF AMERICA

vs.

HOWARD GREGORY BLUM
JAMES DONALD ECKMAN
PETER J. MACHI
AEDAN CHARLES McCARTHY

Peter J. Machi,
Appellant

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is O R D E R E D that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until October 3, 1980.

Circuit Judge

Dated: August 21, 1980

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FEDERAL PUBLIC DEFENDER
WESTERN DISTRICT OF PENNSYLVANIA

APPENDIX 2a

NOV 2 1979

GEORGE E. SCHUMACHER
PUBLIC DEFENDER
WEST. DIST. OF PENNSYLVANIA

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	
vs.	:	Criminal Action No. 79-138
	:	
HOWARD GREGORY BLUM	:	
JAMES DONALD ECKMAN	:	
PETER J. MACHI	:	

MEMORANDUM

BARRON P. McCUNE, District Judge
October 29, 1979.

Following conviction on October 29, 1979, on two Counts of the within Indictment, the United States Attorney moved for revocation of bond as to all defendants pending sentence.

Rule 9(b) of the Appellate Rules provides that if release on bond after conviction is denied, or conditions for release are required, the court shall state, in writing, the reasons for its action.

The court revoked bond pending sentence forthwith on October 29, 1979, as to two of the defendants, Howard Gregory Blum and James Donald Eckman. Peter J. Machi's bond was continued pending sentence.

As to Howard Gregory Blum:

1. We find the defendant to be a danger to the community. The conviction was for conspiracy to rob an armored car carrying about $500,000.00 and for carrying firearms during the conspiracy, specifically when the defendant and his co-conspirators moved into position to rob the car. Federal agents prevented the robbery. Defendant was carrying, along with others, an MI carbine, two revolvers, walkie-talkie radios, masks, a police scanner and was

operating with two stolen vehicles. The crime was a serious one and showed a potential for extreme violence.

2. There is a danger that defendant will flee. Defendant tried to escape before being apprehended when arrest was imminent. Not only does he face sentence here, but he faces trial in Trumbull County, Ohio, on an Indictment charging burglary of a jewelry store in Niles, Ohio. Defendant is not employed, he is divorced and lives separate and apart from his child. He lives with his mother and has few ties to the community where he lives in Ohio.

As to James Donald Eckman:

1. This defendant is considered a danger to the community. The same comments apply as are set forth in paragraph 1 above as to Howard Gregory Blum. In addition, this defendant has a criminal record, having been heretofore convicted of receiving goods from interstate theft.

2. There is a danger that defendant will flee. His employment is not steady. When working, he works for his half-brother. He lives alone, is divorced and lives apart from his two children. His father is deceased. His mother resides in a nursing home in Austintown, Ohio.

BARRON P. McCUNE
UNITED STATES DISTRICT JUDGE

Dated: October 29, 1979

cc: Counsel of record.

APPENDIX 3a-2

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	
vs.	:	Criminal Action No. 79-138
	:	
HOWARD GREGORY BLUM	:	
JAMES DONALD ECKMAN	:	
PETER J. MACHI	:	

ORDER

AND NOW, October 29, 1979, the bonds of Howard Gregory Blum and James Donald Eckman are revoked and they are remanded to the custody of the United States Marshal for the reasons set forth in the accompanying Memorandum.

BARRON P. McCUNE
UNITED STATES DISTRICT JUDGE

cc: Edward J. Schwabenland, A.U.S.A.
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